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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 374

STATE OF TENNESSEE, ex rel.
C. FRANK SMITH,
Petitioner,

vs.

JIM CROUCH, SHERIFF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BERNARD H. CANTOR
Attorney at Law
126 Spring Street
Johnson City, Tennessee
Counsel for Petitioner

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

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OCTOBER TERM, 1965

No. .....

STATE OF TENNESSEE, ex rel.
C. FRANK SMITH,
Petitioner,

vs.

JIM CROUCH, SHERIFF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner C. Frank Smith prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee issued in this cause in which he was denied his application for a Writ of Habeas Corpus.

REFERENCE TO OPINIONS OF COURT BELOW

The opinions in this case have not been published in book or bound form. There are no unofficial reports published of them. The opinions of the Court are from the files of the Court and appear in the record filed in the case:

The opinion on the original appeal at *Record, Vol. II, p. 30,* and in the Appendix to this Petition. The opinion on the Petition to Rehear at *Record, Vol. II, p. 49,* and in the Appendix to this petition.

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked on grounds that Constitutional rights have been refused recognition by the Supreme Court of the State of Tennessee and in the proceedings which they were reviewing.

The judgment of the Supreme Court of Tennessee on the original appeal was entered on the 10th day of January, 1965. See *Record, Vol. II, p. 36.* The judgment of the Supreme Court of Tennessee on the Petition to Rehear was entered on the 6th day of June, 1965. See *Record, Vol. II, p. 49.*

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

Present proceedings begin with a habeas corpus petition filed in the Circuit Court at Jonesboro, Tennessee, questioning imprisonment under four prior convictions secured against the Petitioner in the Criminal Court at Jonesboro, Tennessee, Washington County, Tennessee, on the 24th and 25th of September, 1962. The questions presented are:

That said convictions were void as having been secured by denial of the Petitioner's constitutional rights under the Constitution of the United States as applicable to criminal proceedings in the courts of the several states in that the Petitioner was then and there denied the effective assistance of counsel in the preparation and defense of his cases.

That Petitioner was further denied his constitutional right aforesaid in that Petitioner was denied his right to be tried before impartial and unbiased juries when he was forced, unprepared with counsel taken in forced haste and unprepared, to four trials, seriatim, in two days with some of the same jurors sitting on more than one case.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Fourteenth Amendment to the Constitution of the United States, Section 1, and the Sixth Amendment to the Constitution of the United States, to the extent that the sense of the same is incorporated in the Fourteenth. See *Appendix C & D, pp. A7-A8.*

STATEMENT OF THE CASE

Petitioner was charged with several felonies under inquisitorial presentments returned at the May Term, 1962, of the Criminal Court at Jonesboro, Tennessee. See *Record, Vol. I, p. 55, and Collective Exhibit No. 1, Record, Vol. I, p. 94.* At the next ensuing term, September, 1962, on the first day of the term, September 10, 1962, an attorney with whom Petitioner had consulted appeared at the sounding of the docket and had the cases set specifically for September 24, 1962. See *Testimony of C. Frank Smith, Record, Vol. I, p. 10 at pp. 18-19.* Petitioner's then best efforts, begun in the emergency presented to him, secured no help when the several attorneys approached refused mainly on the grounds that the cases were extremely complicated. See *testimony of C. Frank Smith, Record, Vol. I, p. 10 at pp. 21-24; Mark Hicks, Jr., Record, Vol. I, pp. 69-71; Thomas E. Mitchell, Record, Vol. I, pp. 59-62.*

When trial day arrived, despite his best efforts, Petitioner was without counsel, so told the Court but was held

to trial that very day, in fact, within the hour. See *testimony of Judge Oris D. Hyder, Record, Vol. I, pp. 78-82.* Under that pressure, he had to take the help of the only attorney even present, who was totally unprepared, after a mere fifteen-minute conference. See *testimony of C. Frank Smith, Record, Vol. I, p. 10 at pp. 25-28; Jack Vaughan, Record, Vol. I, pp. 48-58.*

The Court refused a motion for a further continuance to allow for preparation. See *testimony of John A. Brown, Record, Vol. I, pp. 66-68.*

Thereupon, the Court proceeded, one after the other, through four successive trials, two on September 24, and two on September 25, to inevitable convictions, and where 48 jurors were called for, used only 34, with 14 jurors sitting on more than one case. See *testimony of C. Frank Smith, Record, Vol. I, p. 10 at p. 29, and Collective Exhibit No. I, Record, Vol. I, p. 34.*

Appeals were futile. See *Collective Exhibit J, Record, Vol. I, p. W.*

Thereafter, as Relator on an application for a Writ of Habeas Corpus, Petitioner asserted his claim of denial of his constitutional rights, and at each stage in these proceedings. See *Original Petition, Record, Vol. I, pp. D-H, Appellant's Assignments of Error and Brief, Record, Vol. II, p. I, et seq.; Petition to Rehear, Record, Vol. II, p. 37, et seq.*

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

This Court has done much to delineate a civilized and humane concept of due process in criminal case. See *Powell v. Alabama, 287 U.S. 45 (1932) (in which a hasty trial with*

hastily appointed counsel was held a denial of due process); Johnson v. *Zerbst, 304 U.S. 458 (1938) (in which casual conduct was not permitted to constitute a waiver of the right to counsel); Gideon* v. *Wainwright, 372 U.S. 335 (1963) (right to counsel in State Courts).* And the Supreme Court of Tennessee has announced rules of equal, or greater, respect for the individual's rights. See *Jones* v. *State, 78 Tenn. 585 (1882) (time to prepare his defense); Poindexter* v. *State, 183 Tenn. 193, 191 S.W.2d 445 (1946) (right to counsel); State* v. *Poe, 76 Tenn. 647 (1881) (time for counsel to prepare).* Yet these rules were glossed over by the State Court in this case to the obvious detriment of the Petitioner. He needs relief.

The Trial Judge recognized that the Petitioner did not and could not have had adequate representation but denied the writ. See *Record, Vol. I, p. 84.*

The Supreme Court of Tennessee recognized the precipitous entry of counsel into the case, and that the Trial Court had rejected the request for additional time to prepare. See *Opinion, Record, Vol. II, p. 30 at p. 32.* They charged Petitioner with four months' delay in employing counsel. They shrugged off the Petitioner's reliance on the first attorney because no fee had been paid. See *Opinion, supra at p. 34.* And they say, as apparent reason, that Petitioner "is not an indigent person," and without further explanation, deny the writ.

That same Court, on the Petition to Rehear, seems to say that there are different rules regarding constitutional rights on a direct appeal or on habeas corpus. See *Opinion, Record, Vol. II, p. 47.* But this is contrary to Tennessee's own rule. See *Brief, Record, Vol. II, p. 12 (cases cited).* And then the Court rejects all other aspects of the Constitution issue because they might have been raised on a direct appeal. See *Opinion, supra at p. 48.*

These Courts accept the basic fact that the Petitioner did not have fair trials. They are saying that, because he was not indigent, he was not entitled to one.

The State Courts do not use the word "waive" anent these rights, but they suggest that Petitioner somehow lost them if he had them. The lawyers would not take his case. He was slow or late looking for a lawyer. He may have been careless. Can a defendant be stripped of his rights and left to the whim of an impatient Court by less than an "intentional abandonment of a known right" or "an intelligent and competent waiver"? See *Johnson* v. *Zerbst, supra.* This has not been spelled out regarding State Courts, and the ways in which the basic rights might be nullified in the name of "waiver" or under cover of the conclusion that the Petitioner was "not deprived" of a right which, however, he did not enjoy.

CONCLUSION

For all of which this is a proper case for the Supreme Court of the United States to take up the record for review, justice and the public welfare thereby to benefit.

Respectfully submitted,

BERNARD H. CANTOR
Attorney at Law
126 Spring Street
Johnson City, Tennessee
Counsel for Petitioner

APPENDIX A

(Filed January 29, 1965, W. H. Eagle, Clerk)

STATE EX REL C. FRANK SMITH
vs.
JIM CROUCH, SHERIFF OF WASHINGTON COUNTY

} Washington Law

Supreme Court of Tennessee

APPEAL IN ERROR FROM THE CIRCUIT OF WASHTON COUNTY.

HONORABLE R. C. CAMPBELL, JUDGE.

FILED January 29, 1965.

BERNARD H. CANTOR AND JACK E. VAUGHAN, BOTH OF JOHNSON CITY, FOR C. FRANK SMITH.

GEORGE F. McCANLESS, ATTORNEY GENERAL AND EDGAR P. CALHOUN, ASSISTANT ATTORNEY GENERAL, FOR JIM CROUCH, SHERIFF.

AFFIRMED.

S. L. Felts,
Justice.

STATE EX REL C. FRANK SMITH

vs.

JIM CROUCH, SHERIFF OF WASHINGTON COUNTY

Washington Law

Opinion

This is an appeal from the judgment of the Circuit Court of Washington County, dismissing Smith's petition for a writ of habeas corpus.

The petitioner, C. Frank Smith, was indicted in seven cases of forgery or breach of trust at the May, 1962, term of the Criminal Court of Washington County. These indictments arose out of his business affairs as sales agent for the John Deere Farm Implement Company.

The cases were set for trial on May 24, 1962, but Smith appeared before the Criminal Court Judge, Honorable Oris D. Hyder, and asked for a continuance on the ground that he had not had time to secure counsel and wished additional time in which to do so.

The Court granted his request and continued the cases to the September term, 1962. It appears that Smith did little or nothing to secure counsel until shortly before the September term. At that time, he called Mr. Frank Bryant of the Washington County bar, who agreed to get the trial set for two weeks into the term, but refused to represent Smith in the trial.

Smith then contacted some other lawyers the day before the trial, but none would agree at that date to represent him, Petitioner appeared the day of his trial and advised the Court that he had not yet employed counsel. The Court recessed to enable him to find a lawyer, and Mr. Jack Vaughan agreed to represent him.

It further appears that the Court refused a motion for another continuance, and the cases proceeded to trial. Smith was convicted in the four cases that were tried and he was sentenced to serve three years in the State Penitentiary in each case, two of the sentences to run concurrently. All four cases were appealed to this Court, which affirmed the judgments.

While in the custody of the defendant Sheriff awaiting transfer to prison, Smith petitioned the Circuit Court of Washington County, R. C. Campbell, Judge, for a writ of habeas corpus. The petition averred that the judgments were void because there was a denial of due process of law in that his attorney did not have sufficient time to prepare a defense and that he was denied a full appeal because the record of the trial did not reflect the oral motion for a continuance made by his attorney before a court reporter could be hired.

Petitioner was placed on $12,000.00 bond and defendant Sheriff ordered to appear together with Petitioner on August 29, 1963, for a hearing on the matter. The defendant made no return or answer, but appeared with the petitioner at the designated time. Petitioner immediately moved for the relief prayed because the defendant had failed to answer, but the motion was denied. The case then proceeded to a hearing on the merits, and after proof was put on, the petition was dismissed.

Smith has appealed once again to this Court, making six assignments of error which, in substance, are as follows:

(1) The lower court erred in failing to grant the relief prayed for upon the ground that there was no answer or return to the writ of habeas corpus.

(2) The lower court erred in refusing to grant the relief prayed for upon the ground that the petitioner was denied the right of effective representation of counsel when tried in the criminal court in violation of his constitutional rights.

Ordinarily, it is incumbent upon the defendant in a habeas corpus proceeding to answer the petition and show the court why he is holding the petitioner against his will. This is so that the trial court can effectively and intelligently dispose of the petition. See T.C.A. 23-1821 through 23-1827.

However, had the defendant made a return in writing, the most that the return would have set out would have been that the defendant retained the petitioner on authority of judgments of conviction.

The petitioner was allowed bail when the court, on August 2, 1963, ordered the defendant to appear and defend on August 29. The petitioner himself attached copies of the judgments by which he was being detained. Thus, it appears that a written return was a formality, and we do not see how petitioner was adversely affected by defendant's failure to make the return. Petitioner has had a complete hearing on the merits of his case, and defendant's failure to answer could not have resulted in any surprise. Thus, we are constrained to overrule the assignments of error.

Petitioner next insists that these judgments of conviction are void because petitioner and his lawyer were not prepared to go to trial through no fault of his own.

The trial judge found that petitioner "had almost four months within which to obtain counsel and prepare his case, and that he was in no way deprived of any of his con-

stitutional rights by being required to go to trial after he had nearly four months within which to employ counsel and make preparation for his defense. . . ."

The proof produced supports the finding of the trial court. Petitioner testified that he assumed Frank Bryant would represent him; yet he admitted on cross-examination that neither the customary fee nor the terms of employment were ever discussed.

Bryant testified that petitioner called him by long distance telephone on the weekend before the opening of the September term of court and asked Bryant to represent him, but Bryant refused. Bryant said he did agree to have the case set two weeks into the term.

Both of the other attorneys who refused to represent petitioner testified that they were contacted the day before the trial. Petitioner is not an indigent person. He is a businessman of many years experience in the sale of farm equipment.

Under these circumstances, we think the trial court had ample evidence to support the finding that petitioner was not deprived of his rights to a fair trial and that the petition for writ of habeas corpus was without merit.

The judgments of conviction are not in any way shown to be void. No want of jurisdiction in the Criminal Court is shown upon the face of the record, either of the person, or the subject matter generally, or of the particular question to be decided or the relief assumed to be given. See State ex rel Dawson v. Bomar, 209 Tenn. 567, 354 S. W. 2d 763 (1962).

The writ of habeas corpus cannot be used to review or correct errors of law or fact committed by a court in the exercise of its jurisdiction. State ex rel Potter v. Bomar,

209 Tenn. 577, 582, 354 S. W. 2d 767 (1962); State ex rel Holbrook v. Bomar, 211 Tenn. 243, 246, 364 S. W. 2d 887 (1963); State ex rel Kuntz v. Bomar, ... Tenn. ....., 381 S. W. 2d 290, 291 (1964).

For these reasons, the judgment of the Circuit Court is affirmed.

/s/ S. L. Felts,
Justice.

APPENDIX B

(Filed June 2, 1965, W. H. Eagle, Clerk)

STATE OF TENNESSEE ex rel. C. Frank Smith
vs.
JIM CROUCH, Sheriff

} Washington Criminal

Opinion on Petition to Rehear

Counsel have filed a petition to rehear, asserting that the Court overlooked the issue dealing with effective assistance of counsel. This issue, however, was dealt with, and after a review of the facts of the case, the Court approved the holding of the trial court that the petitioner was not deprived of his rights to a fair trial.

Counsel contend that *Johnson* v. *State,* 213 Tenn. 55, 372 S.W.2d 192 (1963), is new authority bearing on the case at bar. However, that case, which was on direct appeal, merely held that where the trial judge had permitted counsel for the defendant to withdraw from the case, he was bound in appointing counsel to give reasonable time to prepare a defense. Defendant had employed counsel and paid him a fee:

> The Court granted this attorney's request to be allowed to withdraw from the case because other court commitments had prevented him from preparing for trial. The Court then appointed counsel to defend the case and ordered the case tried at 1:00 P.M., that same day. Counsel appointed by the Court, in moving for a continuance, stated that at least one witness, on whom a subpoena had not been served, would testify to facts material to the defendant's defense. The defendant himself does not appear to have contributed in any way to the situation which confronted him upon the day of trial. 213 Tenn. at 60.

Counsel complain that the opinion of the Court did not consider that the jurors who tried the cases were improperly selected, and that the record on appeal did not reflect petitioner's motion for a continuance because a court reporter had not been hired. Neither of these contentions has merit. Both issues could have been raised on direct appeal and were not.

This Court has considered petitioner's case thoroughly. The petition to rehear, in general, only reargues points already decided.

The petition to rehear is denied.

/s/ S. L. Felts,
Justice.

APPENDIX C

The Fourteenth Amendment, Section 1, to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any per-

son of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

APPENDIX E

(Filed January 10, 1965 by W. H. Eagle, Clerk)

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE SEPTEMBER TERM 1964

State Ex Rel C. Frank Smith
vs.
Jim Crouch, Sheriff of Washington County
} **Washington Law**

Habeas Corpus Affirmed

Came the plaintiff in error C. Frank Smith by Counsel and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Circuit Court of Washington County and upon consideration thereof the Court is of opinion there is no error in the judgment of the Court below.

It is therefore, ordered, adjudged and decreed that the judgment of the lower court be in all things affirmed, and the Petitioners action is dismissed and that he be placed in the custody of the Warden of the State Penitentiary where he will be legally restrained under a valid sentence in four cases of three years each for breach of trust.

Costs of the cause will be paid by C. Frank Smith, for which let execution issue.

Hamilton S. Burnett
Weldon B. White
Ross W. Dyer

APPENDIX F

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE SEPTEMBER TERM 1964

(Filed July 6, 1965, W. H. Eagle, Clerk)

State of Tennessee ex rel. C. Frank Smith
vs.
Jim Couch, Sheriff
} Washington County Criminal

Petition to Rehear Denied

This cause came on to be further heard on the Petition to Rehear and Reply thereto upon consideration of which the Court is of opinion the petition to rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the petition to rehear is denied.

Costs on the petition to rehear will be paid by C. Frank Smith, for which let execution issue.

(signed) Hamilton S. Burnett, C. J.
Weldon B. White, J.
Ross W. Dyer, J.

No. 374

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SUPREME COURT OF THE UNITED STATES.

C. FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

EDGAR P. CALHOUN,
Assistant Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

C. FRANK SMITH,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari.

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, for its statement in opposition to the petition for the writ of certiorari respectfully shows to the Court as follows:

OPINIONS BELOW.

The original opinions of the Supreme Court of Tennessee upon petitioner's direct appeals from his convictions are included in the record of this cause, designated as Exhibits W, X, Y, and Z. The opinion of the Supreme Court of Tennessee upon the habeas corpus appeal and the opinion upon the petition to rehear that cause are designated Appendix A to the petition for writ of certiorari.

JURISDICTION.

Jurisdiction is sought under 28 U. S. C., Sec. 1257 (3).

QUESTIONS PRESENTED.

The respondent suggests that the questions presented to the Court should be stated as follows:

(1) Whether or not petitioner by his conduct waived the constitutional rights which he contends were denied him.

(2) Whether or not the judgment of the State Court rests on an adequate and independent non-federal ground.

STATEMENT OF THE CASE.

The defendant was convicted in the Criminal Court of Washington County, Tennessee, in two cases of passing forged papers with intent to defraud and two cases of fraudulent breach of trust. He was sentenced to serve three years in the State Penitentiary in each case, with two of the sentences to run concurrently so that petitioner's total punishment is six years confinement in the State Penitentiary. Appeals were made in these cases directly to the Supreme Court of Tennessee and the convictions were affirmed by that Court.

A petition for habeas corpus was filed in the Circuit Court of Washington County which alleged, in essence, that petitioner's constitutional rights were violated because of being forced to go to trial in the aforesaid cases without adequate time to prepare a defense and without counsel until the day of the first trial. The trial judge dismissed the petition for writ of habeas corpus and denied the relief sought, and upon appeal to the Supreme Court of Tennessee the judgment of the lower court was affirmed.

The Supreme Court of Tennessee approved the trial judge's finding of fact in disposing of the petition for writ of habeas corpus. The record of that hearing, which has been transmitted to this Court, reflects the State Court's determination that petitioner's cases were first set for trial on May 24, 1962, but that he was granted a continuance on the ground that he had not had time to secure counsel. It further appears that petitioner contacted Mr. Frank Bryant, an attorney, just before the September, 1962, term of court, but that Mr. Bryant agreed only to get the cases set two weeks into the term for petitioner, and did not agree to represent petitioner. Petitioner did not contact other lawyers until the day

before the trial, and, of course, none would represent him at that late date. Upon the trial date, September 24, 1962, the petitioner was without counsel, but the Court recessed briefly so that petitioner could obtain counsel.

The record further reflects that petitioner obtained Mr. Jack Vaughan of the Washington County, Tennessee, Bar Association to represent him, and that Mr. Vaughan made an oral motion to continue the cases because of lack of preparation. The oral motion, which was not reduced to writing, was overruled and did not appear in the records of the cases. It appears, however, that a similar motion was made and became a part of the record in another of the cases tried the following day.

The matters complained of in the petition for habeas corpus were not presented to the Tennessee Supreme Court upon direct appeal of the convictions. It appears that petitioner's apparent lackadaisical attitude toward his legal difficulties carried over even to the appeal of his convictions. This is suggested by the testimony of Mr. Vaughan upon the habeas corpus hearing by way of explanation as to why only certain issues were raised on direct appeal.

> "A. The only question, if the Court, please, that we went up on, the only thing we could go up on, due to the condition of the record, was the objections that I made to the form of an Inquisitorial Indictment, and they, of course, affirmed the convictions. The whole matter was hard to understand unless you were right in it because, first, I was compelled under the circumstances, with Mr. Smith's apparent anxiety to get back to some kind of business, to, the very next day, file a Motion for a new trial, which did not give me the time that I like to consider what I would set out in a Motion for a new trial."
>
> Direct Testimony, Mr. Jack Vaughan, page 54.

It appears that the criminal convictions against petitioner grew out of written transactions and there has been no showing to this date of any witnesses or evidence not presented which could have been presented at his trials. The petitioner is not an indigent person. He is a businessman with experience in security transactions.

BRIEF AND ARGUMENT.

I.

It is well settled that a constitutional right may be intentionally and competently waived, and the determination of whether there has been an intelligent waiver of the right in question depends upon the particular facts and circumstances surrounding each case, including the background, experience and conduct of the accused. **Cogdell v. State,** 193 Tenn. 261, 246 S. W. 2d 5; **Johnson v. Zerbst,** 304 U. S. 458.

It is equally well settled that the exercise of the right is, of course, subject to the necessities of sound judicial administration and the trial court may properly treat the conduct of the accused as a waiver of the right. **U. S. v. Arlen,** 252 F. (2d) 491; **Spevak v. U. S.,** 158 F. (2d) 594. The finding of the State Court as to the conduct of the petitioner is consistent with the decisions of the Federal courts in the foregoing cases.

II.

The Tennessee Supreme Court stated in its opinion as follows:

> "The judgments of conviction are not in any way shown to be void. No want of jurisdiction in the Criminal Court is shown upon the face of the record, either of the person, or the subject matter generally, or of the particular question to be decided or the relief assumed to be given. See State ex rel. Dawson v. Bomar, 209 Tenn. 567, 354 S. W. 2d 763 (1962).
>
> "The writ of habeas corpus cannot be used to review or correct errors of law or fact committed by a court in the exercise of its jurisdiction. State ex rel.

Potter v. Bomar, 209 Tenn. 577, 582, 354 S. W. 2d 767 (1962); State ex rel. Holbrook v. Bomar, 211 Tenn. 243, 246, 364 S. W. 2d (1963); State ex rel. Kuntz v. Bomar, ... Tenn. ..., 381 S. W. 2d 290, 291 (1964)."

Pages A5, A6, Petition for Writ of Certiorari.

The rule in Tennessee is that a habeas corpus petition filed by one imprisoned under a judgment is a collateral attack upon such judgment and cannot prevail unless the judgment is void. There is a conclusive presumption that all jurisdictional facts have been properly adjudicated and the judgment of a court of general jurisdiction is presumed to be valid unless the record itself affirmatively shows that the court rendering the judgment lacked jurisdiction of the subject matter or of the person. **State ex rel. Holbrook v. Bomar,** *supra.*

The law of Tennessee pertaining to the writ of habeas corpus was applied to petitioner equally and impartially as it is to all persons and classes in Tennessee; consequently, petitioner has not been deprived of due process of law as required by the Fourteenth Amendment to the United States Constitution. **Leeper et al. v. State of Texas,** 139 U. S. 462; **Hurtado v. California,** 110 U. S. 516.

Your respondent suggests that the record clearly reflects that petitioner could have raised all these questions upon direct appeal from his convictions but failed to do so. Assuming petitioner could not have raised such questions upon direct appeal then at the time of filing the petition, it appears the petitioner could have raised such issues by a proceeding in the nature of a writ of error *coram nobis* pursuant to Section 40-3411, Tennessee Code Annotated.

In view of all the foregoing, it is clear that the judgment of the Tennessee Supreme Court is based upon, or might have been based upon, a readily available and

substantial non-federal ground, and the Supreme Court of the United States will not take jurisdiction to review the judgment. **Durley v. Mayo**, 351 U. S. 277.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

EDGAR P. CALHOUN,
Assistant Attorney General,
State of Tennessee.

Certificate of Service.

I, George F. McCanless, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of August, 1965, I served a copy of the within brief in opposition to the petition for the writ of certiorari on C. Frank Smith, petitioner, by mailing said copy in a duly addressed envelope, postage duly paid, to Mr. Bernard H. Cantor, Attorney at Law, 126 Spring Street, Johnson City, Tennessee, counsel for petitioner.

George F. McCanless,
Attorney General,
State of Tennessee.